Office Supreme Court U.S.
FILED
SEP 29 1900
JAMES H. McKENNEY,
Clerk.

No. 374.

Brf. of Bestor for Appellant.

Filed Sept. 29, 1900.

# In the Supreme Court of the United States

OCTOBER TERM, 1900.

No. 374.

THE BIENVILLE WATER SUPPLY COMPANY, Appellant,

vs.

THE CITY OF MOBILE AND JOHN CURTIS BUSH, AS MAYOR, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

## BRIEF FOR APPELLANT.

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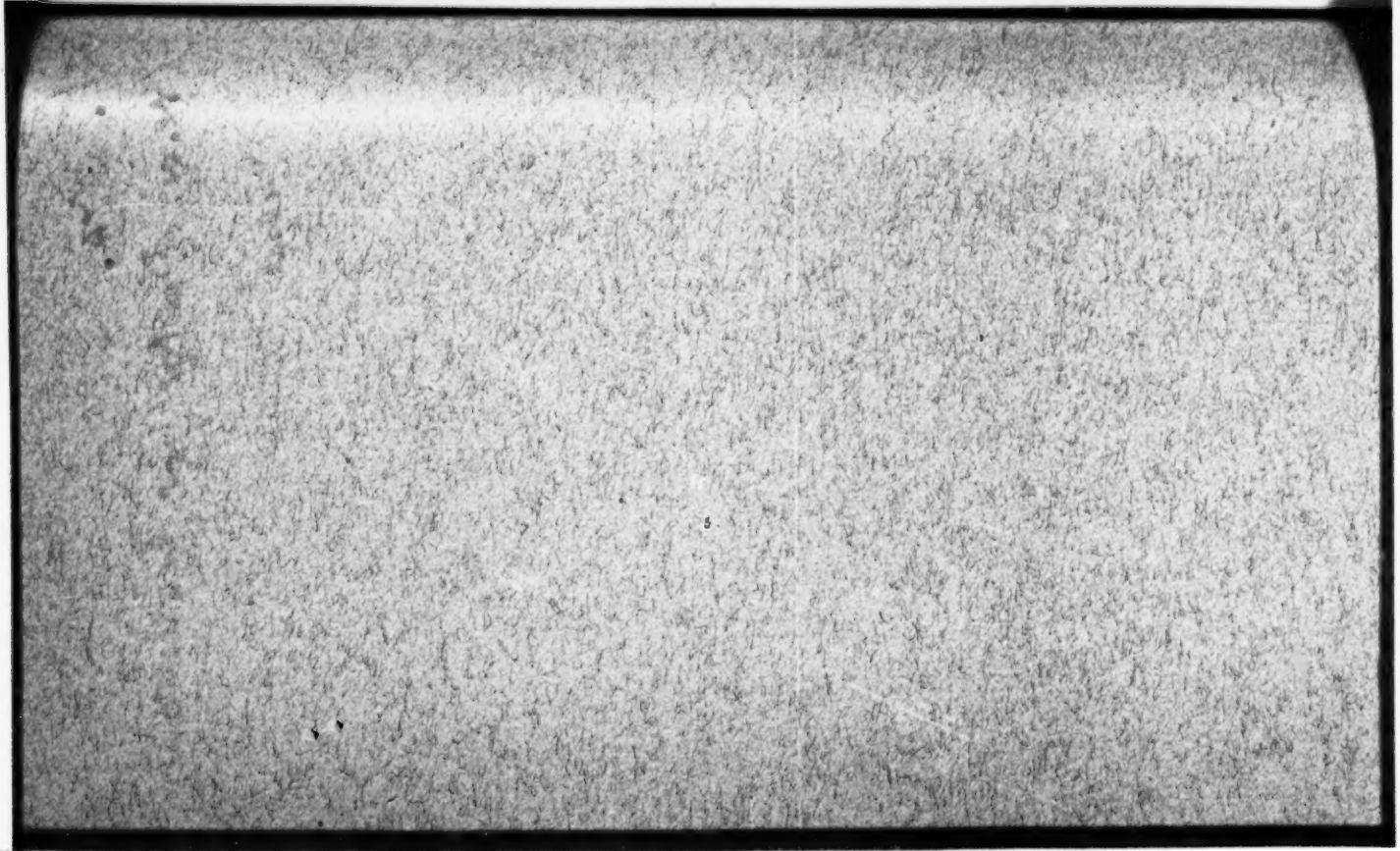

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## BRIEF FOR APPELLANT.

The bill in this cause was filed by the Bienville Water Supply Company, a corporation, against the City of Mobile and its Mayor, on the 21st day of February, 1899. It had for its object the enjoining of the City of Mobile from erecting or operating a system of water works during the 20 years' existence of its charter, or rather, for 20 years from the first day of July, 1888, to-wit, until the 1st day of July, 1908, without complying with the provision of such charter as to arbitration or purchase, or without complying with the constitutional provision of the State of Alabama prohibiting the alteration of its charter, except "in such manner that no injustice shall be done to the corporators."

Constitution of Alabama, Article 14, Section 10.

The application was made to the Circuit Court of the United States to protect the chartered contractual rights of appellant under Article I, Section 10, of the Constitution of the United States, which provides that "No State shall pass any law impairing the obligation of contracts."

Const. of U. S., Article I, Section 10.

The Bienville Water Supply Company was chartered on the 19th day of February, 1883. (Record, p. 71.) The eleventh section of its charter provides: "That said corporation shall have and enjoy the *exclusive* right and privilege of conducting and bringing water from any other source than Three Mile Creek, in the County of Mobile, for the supply of said Port (City of Mobile) for the period of twenty years from the time when said water shall have been brought into and be ready for distribution within the corporate limits of said Port, and till the municipal authorities of said Port—if so by law authorized, shall *purchase* the water works and property of said corporation as hereinafter provided." (Record, page 69.)

Sec. twelve of its charter provides: "That after the expiration of said period of twenty years, in case the General Assembly of Alabama so authorize, the corporate authorities then existing for the government of the territory now known as the Port of Mobile, the said corporate authorities may then purchase the property and rights of said corporation on such terms as may be agreed upon on a valuation to be made by five referees, two to be appointed by said municipal authorities, two by the Bienville Water Supply Company, and one to be selected by the other four referees, but none of said referees shall be residents of the county of Mobile." (Record, page 70.)

This charter was amended and extended on the 14th of February, 1885, but this amendatory act, in section three of the same, still grants to appellant the *exclusive right* of conducting water into Mobile from all sources, other than Three Mile Creek. It makes no change in this *exclusive* grant from the original charter.

Sections 2 and 3 of Amended Act, Record, p. 72.

But said amendment further confers on appellant "all the powers and privileges of private corporations under the laws of the State"—(Alabama.)

Section 1 of Amendment, Record, page 72.

Under these grants from the Legislature of the State of Alabama, the Bienville Water Supply Company issued its six per cent. bonds for $750,000, placed them in the hands of bona fide holders, and thus raised the money and built its water works plant at a cost of over $750,000, made contracts with the city for supplying it with its necessary water for city purposes, and in fact did, for nearly twelve years, supply the City of Mobile and its inhabitants with an abundant supply of pure water.

The contracts made between appellant and the City of Mobile for the supply of water would not expire until the first day of July, 1900. The city began its agitation of owning its own water works by a resolution passed by the municipal board on the 12th day of July, 1897, calling an election to be held on the 2nd day of August, 1897, to ascertain whether or not a majority of the citizens of Mobile would by their votes approve of the General Council's *contracting for, building or purchasing* or otherwise acquiring a system of water works. But nothing definite was done by the city contemplating the *erection* of its own water works until the 5th day of May, 1898, when it applied to the Probate Court of Mobile County to condemn certain lands belonging to Dr. George A. Ketchum, the President of the Bienville Water Supply Company, so as to enable it to get the right of way for its pipes to Eight Mile Creek. This was resisted by Dr. Ketchum, as such president, on the ground that the city had no authority to condemn lands outside of its corporate limits. The city seeing this legal position to be sound, abandoned this suit. The next action it took looking to the erection of its own water works was on the 25th day of June, 1898, by a bill filed in the State Chancery Court to compel Walter Wood, the Treasurer of the Bienville Water Supply Company and one of its stockholders and directors, to accept for his interest in the Stein Water Works $17,298.27, the amount arbitrators chosen by the city and one Stein, in which choice Wood took no part and had no voice, awarded to him for such interest. (Record, pages 73-98.) This cause was removed to the United States Circuit Court, and the city was defeated in this suit.

The appellant then fearing that the city proposed to issue bonds to raise money to erect its water works, filed a bill in the State Chancery Court of Mobile on the 14th day of September, 1898, to prohibit it from issuing negotiable bonds. The city then applied to the Legislature of the State of Alabama in November, 1898, for the passage of a bill authorizing it to issue such bonds. The passage of this bill was resisted by the Bienville Water Supply Company before the legislature and before the committees of both houses. (Record, pages 33, 142, 154, 155.)

This bill authorizing the City of Mobile to issue bonds, and another to buy, provide for and maintain water works, was passed and approved by the Governor on the 30th day of November, 1898.

The City of Mobile obtained from the legislature further legislation by several bills—one authorizing the city to provide for a system of water works and sewerage, approved November 30, 1898; another authorizing the city to condemn the interest of Wood in the city or Stein water works, Wood being the secretary and a stockholder in the Bienville Water Works Company and holding such interest for the benefit of the Bienville Water Company. This bill was approved December 10, 1898. Another bill repealed the exclusive right of appellant, granted to it in its charter. Said bill was approved February 23rd, 1899. All these acts and the ordinance of the city will be more particularly referred to hereafter, in this brief.

The Bienville Water Supply Company objected at all times to the city erecting a new water works plant, but hoped it would under the powers of "contracting for" or "purchasing" water works as provided by its charter and the several acts and ordinances hereinafter referred to in this record, *buy* its works, or submit the question of their value to arbitrators as provided for by the charter of the water company. The appellant at length became satisfied that only the building and erection of new water works were contemplated by the city, which would break down its income and destroy the value of its outstanding bonds and stock, and in fact ruin its property. It then applied to the United States Circuit Court to protect it by this bill filed on the 21st day of Febru ary, 1899.

The errors assigned are:

First. In refusing complainant relief.

Second. In the decree rendered on June 4, 1900.

Third. In dismissing the bill.

They raise all the points and questions to be insisted on in this argument.

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## ARGUMENT.

The Legislature of Alabama granted to appellant the exclusive privilege of supplying water to Mobile and its inhabitants except from Three Mile Creek. (Record, p. 69, 72.)

"A grant in its own nature amounts to an extinguishment of the right of the grantor and implies a contract not to reassert that right."

Fletcher vs. Peck, 6 Cranch, U. S., p. 87.

Mr. Webster's argument in Dartmouth College case, 10 Vol. World's Best Orations, page 3860, and many decisions of this court have held that such language creates a contract between the State and the grantee which can not be changed or taken away by the legislature by reason of the prohibition in the constitution of the United States as set forth in Article I, of Section 10.

N. O. Gas Light Co. vs. Louisiana Light Co., 115 U. S., 650.

N. O. Water Works Co. vs. Rivers, 115 U. S., 674.

Binghampton Bridge case, 3 Wallace, 51.

But the constitution of Alabama provides that:

"No ex-post facto law, or any law impairing the obligation of contracts or making any irrevocable grants or special privileges or immunities shall be passed by the General Assembly."

Constitution of Alabama, Article I, Section 23.

But the Constitution of Alabama further provides that "The General Assembly shall have the power to alter, revoke or amend any charter of incorporations now existing, and revocable at the ratification of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of the State: *in such manner, however, that no injustice shall be done to the corporators*"

Constitution of Alabama, Article 14, Section 10, and this court has decided that where the condition of the grant is by the terms of the constitution of the State that the legislature may alter or revoke it, a law altering or revoking it, or which has the effect to alter or revoke the character of such privileges, cannot be regarded as one impairing the obligation of the contract.

Chesapeake & Ohio Railway Co. vs. Miller, 114 U. S., 176.

Hamilton Gas Light and Coke Co. vs. City of Hamilton, 146 U. S., 258.

But it is respectfully submitted that these decisions do not apply to the case at bar, for this decision in 146th United States passed upon the Constitution of Ohio, and the one in 114 U. S., passed upon the Constitution of Virginia, and the Constitutions of Ohio and Virginia have no such clause as Section 10 of Article 14 of the Constitution of Alabama, above quoted.

Our contention is that the legislature has the power to alter, revoke or amend or to pass a law which has the effect to alter, revoke or amend in such manner only as would work no injustice to the corporators. In other words, only by making or providing for just compensation to the incorporators, the company or the stockholders.

The Constitution of Pennsylvania has nearly the same wording of the Constitution of Alabama as to the power of the legislature to alter, amend, &c., for the protection of corporations and invested capital from ruin. The Constitution of Pennsylvania provides that "The general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this commonwealth, in such manner, however, that *no injustice shall be done to the corporators.*"

In the case of Tyrone Gas & Water Co. vs. The Borough of Tyrone, decided in February, 1900, Judge Bell, in commenting on and construing the meaning of this clause of the Pennsylvania corporation, uses this language: "That the water company ought not then to be heard to complain of the legislation allowing the Borough to purchase, since from its very inception, it was subject to such legislation. On the other hand, the Borough has no true ground for fault finding, since by the fundamental law of the land, the constitution itself, confiscation of franchises without compensation to the corporators is prohibited.

"The Borough is not prejudiced by making it pay a reasonable price for the water company's plant. It would have to expend large sums of money to duplicate said works and then the result would be that by building a municipal plant, the value of the private plant would

be destroyed, it would be useless destruction of property without adequate compensation from any point you view the transaction."

Judge Bell's opinion, supra.

The City of Tyrone undertook to build new water works, without purchasing the private water works and without granting any compensation to the private corporation which had been and was still supplying Tyrone with water. The Private water company brought an action to restrain the municipality from doing so under the exclusive privilege of its charter and the court made an injunction perpetual, because the city had made no provision for compensating the corporators.

Tyrone Gas & Water Co. vs. Borough of Tyrone, decided January 24, 1900, and reported in Penn. record, Vol. 1, page 37.

Judge Dean in 177 Pennsylvania, page 651, says:

"If anything be manifest it is that if two water mains be laid side by side in the same street equally accessible to the householder on each side, conveying double the quantity needed with double sets of hydrants, pumping stations, offices, salaries and expenses, one or the other must be abandoned. No community will pay double for any article of necessity or luxury. If the property owned must by compulsory taxation support the private corporation system, such a conflict of interests will inevitably bankrupt the system which depends on the volume and patronage of the public. We hesitate to assume, every court is bound to hesitate before assuming the legislature intends, by grants to distinct corporations for public purposes, there shall arise such conflict in the exercise of the franchise as will result in the practical destruction of property of any citizen without *compensation.*"

And again in 177 Pennsylvania, page 653, Judge Dean says:

"A municipality in its beginning is perhaps not financially strong or its debt may approach the constitutional limit so closely that it cannot borrow; nevertheless, the low state of its financial condition does not render less urgent the necessity of a water supply. It can obtain it in but one way, by contract with those who have the money and are willing to invest their private capital in the construction of water works. The legislature knew capital would not be invested in such an enterprise if in the future it were liable to confiscation by competition with a public enterprise operated from a municipal treasury, capable of replenishment from the pocket of the tax-payer."

Judge Dean then proceeds to point out that the municipality can purchase the plant of the water company by paying a reasonable price therefor, that the right to so purchase is provided by the legislature, and the method of determining what is a reasonable price is within the supervision of the court.

This same principle of providing for just compensation when the legislature takes away or impairs the value of private property for public use (otherwise and without such compensation, such act would be unconstitutional) is passed upon and upheld by this court in

Sweet vs. Richel, 159 U. S., 380.

See also, Brickett vs. Haverhill Aqueduct Co., 142 Mass., 394, 396.

And the above argument also applies to the construction of the latter part of the third section of the amendment to the charter of appellant passed by the legislature and approved February 14, 1885, as set forth on page 73 of the record.

After the legislature again reiterated and confirmed the exclusive privilege grant, it uses these words: "But nothing in this act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the City of Mobile or any other place with water which does not *interfere* with the property rights, or rights of obtaining water pertaining to this company." (Record, page 73.)

The language we construe to mean nothing more than to express the same idea incorporated in article 14, Section 10 of the Constitution of Alabama, viz: provided "no injustice shall be done the corporators." This amendment provides only for the *organization* of a company for the purpose of supplying the City of Mobile with water, but it limits this right so that it must not interfere with the property rights of the Bienville company. This honesty of remuneration to the Bienville company in case the city should in future become able to deem it best to own its own water works, runs through all these possibilities of changes of the corporate grants to the Bienville Company, both in the Constitution of Alabama and by the amendment to the charter of the company so as to render the exclusive grants and privileges not obnoxious to the clause in the Constitution of Alabama,

Article 1 Section 23, forbidding the legislature from making irrevocable grants or special privileges.

But a strict construction of this language (Record, p. 73) it seems to us, would not include the City of Mobile. The legislature has made the grant to the Bienville Company. The very principle and meaning of a grant to another, excludes the right of the grantor to take it back. The City of Mobile, a mere municipal corporation, is but the creature of the State. It has no powers, except those the State gives it. These can be taken away from it whenever the legislature sees fit so to do. and the inhibition of the Constitution of the United States against the impairing of contracts does not include or apply to grants to municipalities. The qualification in the amendment (Record, page 73) is that "nothing in this act shall be construed to prohibit the *organization* hereafter of *any company* for the purpose of supplying water, &c. Certainly the City of Mobile is not a "company" expressed or implied by this language. It could not be afterwards "organized" for it had for nearly eighty years been chartered and organized. The language evidently applies to the possible future organization of some company and certainly not to the City of Mobile, and the City of Mobile can claim no benefit or rights under such amendment.

But the answer of appellee to this legal proposition, incorporated in the fundamental law of the State (Constitution of Alabama, Article 14, Section 10,) is "That all questions in reference to the injury suffered by appellant upon the repeal of the alleged exclusive privilege and the just operation of the act were necessarily matters of legislature discretion and not of judicial determination" and then appellees' counsel refer as authority to this proposition to

101 Alabama, page 65;

60 Alabama, page 278;

Magoun vs. Ill. Trust and Savings Bank, 170 U. S., 283, 298.

It is respectfully suggested that these authorities have no bearing whatever on the principle above contended for by appellant. The first (101 Alabama, 51) is the application to the court for a mandamus to compel

the mayor to administer the oath of office to the chief of police. The court decided that the act to be performed by the mayor was purely ministerial and granted the mandamus. It merely states on page 65 referred to by counsel for appellee, that "The legislative power intended to be vested in the general assembly can not be delegated to any other body, whether such body be of either the other defined departments or not, but must be exercised exclusively by the general assembly." Of course this is horn-book law.

The second (60 Alabama, 278-271,) decides that "An act to authorize the people of a particular county to vote on the question of removing the county site and to permanently locate the same according to their vote is not a 'special or local law for the benefit of individuals or a corporation as those terms are used in the 23rd section of the 4th article of the constitution, and whether the object of such a law can or can not be provided for by a general statute within that provision of the constitution is a question of legislative discretion and not of judicial determination." It will at once be seen that this is a very different proposition from the one we have contended for above.

The third authority (170 U. S., pages 283, 298,) decides that the matter of the amount of property to be exempt from legal process for the payment of debts must depend upon the judgment of the legislature of each State and can not be the subject to judicial review," and that the Inheritance tax law of Illinois makes a classification for taxation which the legislature had power to make, and does not conflict in any way with the provisions of the Constitution of the United States.

Without lengthening this brief by an argument showing the distinction between these authorities and the case at bar, it is respectfully suggested that these authorities present very different propositions of law from the one claimed by appellant, viz: that where the constitution provides (Article 14, Section 10, Constitution of Alabama,) for the alteration, revocation or amendment of a charter, it does it with the condition or limitation that it can be done only " in such manner, however, that no injustice shall be done to the corporators."

In this cause before the court, the legislature has granted new rights and new franchises, to the city, has

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repealed the exclusive privileges granted to the Bienville Water Company, and in fact has done any and everything requested by the city so as to put it in its power to ruin and break down the property of the private corporation which had invested over $750,000 in the water plant, which cost neither the city nor any tax-payer therein one dollar, which powers the city has exercised with the severity not resorted to by fair dealing and which hardly any individual would dare to risk to be tested by any of the rules governing the private dealings among men. The "legislative descretion" relied upon by appellee as forbidding appellant to assert his rights after such open confiscation, would prohibit the courts to inquire into any legislation, no matter how repulsive it should be to Article 1, Section 10 of the constitution of the United States.

Such acts of the legislature and such ordinances and actions of the City of Mobile have deprived appellant of its property without due process of law and without just compensation in violation of the spirit, if not the letter of Article 5 of the amendment to the constitution of the United States. We appeal to the Federal courts, for they alone must decide whether or not the contract has been violated, regardless of State legislation.

McGahey vs. Virginia, 135 U. S., 662, 667.
Gelpcke vs. City of Dubuque, 1 Wall., 175.

SECOND.

The City of Mobile has no constitutional power to engage in the business of selling of water to others for profit, as it is doing.

Article I, Section 37 of the Constitution of Alabama reads as follows:

"That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and when the government assumes other functions it is usurpation and oppression."

Article IV, Section 50 reads as follows:

"The General Assembly shall not have power to authorize any municipal corparation to pass any laws inconsistent with the general laws of this State."

Article IV, Section 54 reads as follows:

"The State shall not engage in works of internal improvement nor lend money or its credit in aid of such, nor shall the State be interested in any private or corporate enterprise, or lend money or its credit to any individual, association or corporation."

Article IV, Section 55 reads as follows :

"The General Assembly shall have no power to authorize any county, city or town, or other sub-division of this State to lend its credit or to grant public money or thing of value in aid of or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company by issuing bonds or otherwise."

A municipal corporation can erect water works for municipal purposes, but it can not go into the business in Alabama of selling water in competition with private capital in the same business. It has been decided in Wolverhampton vs. Bilston, in 1891, 1 Ch., that where the profits of the water works were to be used by the city, that such corporation was a water company supplying water for its own profit, and hence in the business or trade of selling water.

Wolverhampton vs. Bilston, 1 Ch., 315, 29 Am. & Eng. En. of Law, p. 2, note 2.

## THIRD.

But appellee claims that appellant has been guilty of laches in not taking action sooner in applying for an injunction.

We understand this rule of equity as to laches to be that "the acquiesence which will bar relief must be such as prove plaintiff's assent to the acts complained of and to the injuries which may reasonably be anticipated to flow from such acts."

1 High on Injunctions, Section 10.

About a strong a case as we find upholding the principle of laches depriving a litigant of his rights, is that of the Penn Mutual Life Ins. Co. vs. Austin, 168 U. S., 685. In that case the court, on page 699, say "From the time of the submission to the vote, and of the ordinances issuing the bonds and directing the work to be done, all in 1890, until this bill was filed in 1895, (five years) no legal steps whatever appear by the bill to have been taken to prevent the consummation of the wrong which

the bill alleges was necessarily to result from the action of the municipal authorities." Page 699.

In Spudel vs. Henrici, 120 U. S., 377, 387, this court said: "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. A court of equity said Lord Camden, has always refused its aid to stale demands, where the party slept upon his rights and acquiesced for a *great* length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable dilligence."

The action of appellant comes under no rule of laches when measured by these standards. When the election was held in July, 1897, the Bienville Water Supply Company believed and had a right to believe when measuring men's actions by common, fair dealing and honesty, that under the authority of the charter of the city to "contract for" or "purchase" water works, and the provision of the Constitution of Alabama, that they could not be deprived of their chartered rights, except by proper remuneration, that the city would purchase or provide for its remuneration. When the city applied to the Probate Court of Mobile county to condemn certain lands for water purposes, it then saw the probable action of the city and began to contest the city's right to build new works and destroy appellant, and through its president defended and defeated this effort of the city.

Charged in the bill, Record, page 7, and admitted in answer; Record, bottom of page 29.

When the city then attempted in March, 1898, to secure the interest of Walter Wood, the Treasurer of the Bienville Supply Company, in the Stein water works, which interest Mr. Wood held for the interest of the Bienville Company, this was resisted by Mr. Wood and defeated by him. (Record, p. 73-98.)

When the city then proposed to issue bonds to build its own water works, the appellant filed a bill in the Chancery Court on the 14th of September, 1898, to prohibit the city from so doing. (Record, page 121.)

When the city, through its representatives, in November, 1898, applied to the legislature for several bills authorizing the city to issue bonds, condemn property

and to do any and everything to break down the value of the property of appellant, appellant still again resisted this drastic legislation. (Record, pages 33, 142, 154, 155.)

The proof shows that the Bienville Water Supply Company has at all times and in every way by offers of arbitration as to price, by objections from time to time, of the city's actions, by expostulation and legal proceedings, endeavored from the beginning of the agitation of the water works question to get the city to buy or arbitrate, made objections to the city building new water works and thus necessarily ruining appellant's property. (Record, bottom of page 108, top of page 109) so the principle of laches as construed by the authorities above cited, can not be applied to appellant, which after exhausting every other effort and remedy, applied to the court for an injunction on the 21st day of February, 1899. Record, page 18.

FOURTH.

But we have had notice of a motion filed in this cause by appellee to dismiss or affirm. We presume this motion is under rule sixth, sub-division 5 of this court. This rule provides that such motion must be "on the ground that although the record may show that this court has jurisdiction, it is manifest the writ of error or appeal was taken for delay only, or that the question on which the jurisdiction depends is so *frivolous* as not to need further argument."

The bill is filed to restrain the city under powers derived from the legislature from violating its chartered rights under Article I. Section 10 of the constitution of the United States, and Article V of the amendments to to the constitution of the United States. It claims that even if appellant's exclusive rights and special privileges are prohibited by the constitution of Alabama, yet that after being given by the legislature of Alabama, they can not be taken away or impaired except it shall be done "in such manner however that no injustice shall be done to the corporators."

Article XIV, Section 10 of Constitution of Alabama, supra.

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Then it must be manifest that the appeal was taken, First, for *delay only*, or, Second, that the question of impairing or violating its chartered rights, or of depriving it of its property without due process of law, is so *fricolous* as to need no further argument.

FIRST. How can it be plausibly contended under the facts in this cause that the appeal is taken for delay only? The application for an injunction or restraining order has been denied by the court and the bill has been dismissed on its merits by the United States Circuit Court. No damage has been done or can be done to appellee by the delay until appellant can get the superior judgment of this august court. The city is left free to proceed to erect water works, sell water from the Stein works, and is not and can not be interfered with in any way by appellant. Then how can the city be injured, or the Bienville Water Company be benefitted by delay until this cause can be regularly reached, and appellant can get the judgment of this court as to its rights, after hearing argument and after due consideration? If there had been a moneyed decree rendered against the appellant, or a restraining order or an injunction against appellee, or any other order had been made by the court whereby the city could be injured by delay or time, then we can see how, under this rule, this motion to dismiss or affirm might be entertained by the court. Nothing has been accomplished by the bill, no harm or damage has been or is being done to the city, so that the proposition that the appeal was taken for "delay only" is not at all sustained by the facts of the cause. SECOND. Then is the question on which the jurisdiction depends "so frivolous as not to need further argument?"

It is settled law that a motion to affirm will not be entertained unless there is a *color* of right to the motion to dismiss.

Davis vs. Corbin, 113 U. S., 687.

Ackley School District vs. Hall, 106 U. S., 428.

Micas vs. Williams, 104 U. S., 556.

Hinckley vs. Morton, 103 U. S., 764.

Whitney vs. Cook, 99 U. S., 607.

We contend, therefore, that there is no color of for the dismissal of this cause. Should the court ever, entertain this motion to affirm, then we present the following in opposition to the granting of such motion:

The legislature granted to the Bienville Supply Co. the exclusive right to supply water to the city and its inhabitants. The constitution of Alabama guards the rights of these corporators who invested this large amount of money in the water works by prohibiting them from being taken away from them except "in such manner that no injustice shall be done to the corporators." Supra.

In other words, the Water Company can not be deprived of its franchises and property without making compensation to the Water Company. The city can either arbitrate as to the value of the water works, or buy them. The city proposes to do neither, but by its politicians sent to the legislature has secured the most drastic laws which necessarily result in the absolute ruin and confiscation of appellant's property, viz: An act to authorize the City of Mobile to issue bonds to purchase or otherwise acquire water works, approved November 30, 1898. (Record, page 41.)

2. An act authorizing the City of Mobile to provide, maintain, etc., water works, approved November 30, 1898. (Record, page 43.)

3. The exclusive privilege and grant to the Bienville Company conferred in 1885 by its charter, was taken away by the legislature on the 23rd of February, 1899, (Record, page 21,) and also by act of November 30th, 1898. (Record, page 43.)

4. An act to authorize the City of Mobile for the purpose of aiding in the erection of its municipal water works to condemn by eminent domain the outstanding interest of Walter Wood in the Mobile City or Stein Water Works, approved December 10th, 1898. (Record, page 27.)

An ordinance of the City of Mobile to authorize and provide for the issuance of bonds by the City of Mobile

ıe purpose of acquiring systems of water works, ›ved December 6th, 1898. (Record, page 47.)

So there were four distinct acts of the legislature, having for their object to confer upon the City of Mobile powers necessary for it to act untrammeled in building its own water works and one ordinance of the city, which would necessarily ruin the appellant's property, and in not one of these acts is any provision made for any compensation to be made to appellant for the destruction of the value of its property. It will be noticed that all these bills, except the one of February 23rd, 1899, (passed two days after this bill was filed) and the one authorizing the city to condemn property, contemplated the grant of authority to *buy* water works. It was only after these bills were passed, did the city show its savage feeling of destroying appellant's property without reimbursing it in any way. When such severe and drastic acts, are undertaken by the municipal body which any man who values his own reputation for fair business dealings would scarcely dare to place himself before his fellow man as doing in his own individual person, this high court of equity, we confidently believe, will with great hesitancy, dismiss and thus turn out of court the application of honest men who have spent over $750,000 of their money to the great benefit of the very people who are now ruining their investment merely because they have the aggregated power so to do, on the ground that the "appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

The Irish parliament of James the Second, in 1689, in repealing "The act of settlement," and declaring void all titles to property of Protestants in Ireland, was scarcely more severe in unlawfully depriving his subject of their property than the action of the City Council in this cause, and this act has been condemned by historians as the very worst and most arbitrarily severe measure of the many unlawful and mean things done by that cruel and unjust sovereign.

3 Vol. Macauley's History of England, page 190, et seg.

The question presented is the violation of the solemn contract of the legislature, the depriving appellant of its property without compensation or due process of law. It presents the life or destruction of over $750,000 of property, is not *frivolous* in amount, and presents to the court a serious jurisdictional question, which State courts of high standing have decided in favor of appellant's contention, and hence Counsel will hardly be pronounced "frivolous" for so presenting such a question for the final decision of this court of great standing and of last resort.

Respectfully submitted by

D. P. BESTOR,

Counsel for Appellant.

# In the Supreme Court of the United States.

October Term, 1900. No. 374.

*Bienville Water Supply Company, Appellant,*

vs.

*The City of Mobile* et al., *Appellees.*

## Additional Brief on Behalf of Appellant upon the Motion of Appellees to Dismiss or Affirm.

Without discussing the various points raised by the record, it is submitted that there is one question involved in this case which is clearly not of a character to be disposed of on a motion to dismiss. That question is, whether under a provision of the Constitution of Alabama, allowing an amendment of existing charters, "in such manner, however, that no "injustice shall be done to the corporators," the legislature, after making a grant of certain water privileges for a limited number of years, upon the faith of which a water company expends $850,000, can arbitrarily, without any compensation, or provision for compensation, revoke that grant.

The question arises under the following facts:—

There are two separate plants by which the city of Mobile is supplied with water. The first was the Stein plant, erected under certain statutes which gave the owners the sole right of supplying the city with water from a creek called Three Mile Creek. This supply proving insufficient, the legislature of Alabama, in 1883, passed two statutes (found on pages 66 and 72 of the Record) granting to the Bienville Water Supply Company the exclusive privilege for twenty years of supplying the city of Mobile with water from any other source

than Three Mile Creek, in the county of Mobile, with the right on the part of the city to purchase the plant at the expiration of the time, upon certain terms, and with a provision that the Act should not be construed as prohibiting the organization of any other company to supply the city of Mobile with water which did not interfere with the water rights of the Bienville Water Supply Company. The owners of the Stein plant claimed that their right to supply the city of Mobile was exclusive, but this court, in the case of—

Stein *vs.* Bienville Water Supply Co., 141 U. S., page 67,

held that the exclusive grant under which Stein claimed was limited to the Three Mile Creek, and did not prevent a similar grant to the Bienville Water Supply Company of the privilege of supplying the city of Mobile from the other streams in the county of Mobile.

In pursuance of the statutory authority aforesaid, the Bienville Water Supply Company expended $850,000 in the erection of a plant, and entered into a contract with the city of Mobile, under which it is at present supplying water to the city. In fact, as appears by the opinion of certain equity proceedings, printed on page 99 of the record, the city is compelling, by legal proceedings, the water company to supply water to it by means of this plant, and has obtained an injunction against any discontinuance of the supply. Recently the legislature, without the consent of the Bienville Water Supply Company, amended the Act incorporating it by re-enacting the grant to supply water from any other source than Three Mile Creek, in the county of Mobile, and leaving out the word "exclusive." In other words, the legislature repealed the exclusive grant for the limited time, and upon the terms mentioned in the original Act, and substituted therefor merely a right to take water. This amendatory Act is found on page 21 of the record. It contains no provision for compensation to the water company, or for any other remedy to said company or its stockholders for the taking away of a valuable franchise. Prior to the passage of this Act, another Act had been passed authorizing the city of Mobile to provide, maintain and operate systems of water

works. This Act is printed page 43 of the record. The city of Mobile admits in its answer filed in the cause (page 30 of Record), that it is causing its engineers and surveyors to make surveys, estimates and reports as to a site on Eight Mile Creek (one of the streams within the grant to the Bienville Company) for the location of a reservoir and source of water supply, and that it proposes to establish such system upon Eight Mile Creek and to use its water to supply the city.

There can be no question as to the injustice and hardship of this legislation. The large amount of money expended by the water company was spent upon the faith of a grant which the legislature has now repealed, without any provision for compensation. It is claimed, however, that this is legally unassailable, because of the following provision in the Constitution of Alabama, viz.:—

"The General Assembly shall have the power to alter, re-"voke or amend any charter of incorporations now existing "and revocable at the ratification of this Constitution, or any "that may hereafter be created, whenever in their opinion it "may be injurious to the citizens of the State, in such man-"ner, however, that no injustice shall be done to the corpo-"rators."

Under this clause, the broad claim is apparently made in the brief accompanying the motion to dismiss that the legislature can revoke any grant to a corporation, without making any provision to prevent inevitable injustice to the corporators, and that the words, "in such manner, however, that "no injustice shall be done to the corporators," are not a limitation on the power of the legislature which can be enforced by the courts.

No authority is cited in the brief which supports any such doctrine. This court has held that where, by the terms of the Constitution of a State there is reserved an unlimited power of repeal, alteration or amendment, the charter of a corporation subsequently granted is subject to that condition. The cases, however, in which this has been held have all been cases of an unlimited and unrestricted power of repeal. The present case is one in which, by the terms of the Constitution, there was not granted an unlimited power of repeal, but

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K P. PRICHARD,
G. JOHNSON,
*For Appellant.*

No. 1286. October Term, 1901.

Office Supreme Court U. S.
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Supreme Court of the United States.

IN EQUITY.

Filed Oct. 9, 1901.

The Bienville Water Supply Company, Complainant below and Appellant,

*vs.*

The City of Mobile and John Curtis Bush, Mayor thereof, Respondents below and Appellees.

APPEAL FROM A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

(Record No. 17,859.)

# BRIEF FOR APPELLANT.

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FRANK P. PRICHARD,
D. P. BESTOR,
JOHN G. JOHNSON,

SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

*The Bienville Water Supply Company, Complainant below, and Appellant,*

vs.

*The City of Mobile and John Curtis Bush, Mayor thereof, Respondents below, and Appellees.*

October Term, 1901.

No. 126.

*SUR* APPEAL OF COMPLAINANT FROM A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

*BRIEF FOR APPELLANT.*

## STATEMENT OF THE CASE.

Prior to the year 1885 the city of Mobile was suffering from a wholly inadequate water system. (Record, pages 110, 120 and 144.) Its only source of supply was a plant erected over forty years before by one Albert Stein, under a contract dated December 26th, 1840, and ratified by an Act of the Legislature January 7th, 1841. (Record, page 173.) By this contract and statute, Stein had the

exclusive right to supply the city with water from a stream called Three-Mile Creek, and the city had the right to purchase the plant at a price to be fixed by arbitration. (Record, page 176.) The plant was in 1885 wholly inadequate; there was no proper protection from fire and insurance rates were inordinately high; the city was unable or unwilling to erect its own water works; all efforts to induce the owners to enlarge and improve the Stein plant had failed, and although a number of applications had been made for charters for water companies, capital could not be obtained for the enterprise. (Record, pages 110 and 120.) Finally, under a charter granted to the Bienville Water Supply Company, by two statutes dated respectively February 19th, 1883 (Record, page 66), and February 14th, 1885 (Record, page 72), capitalists were induced to put their money into the enterprise and new works were built. (Record, page 110.)

Briefly stated, the provisions of the two statutes constituting the charter of the Bienville Water Supply Company were:—

1. The company was given all the rights vested by contract or law in the city to purchase the Stein franchise and plant, and for that purpose was to be considered the assignee of the city.

2. The company was given the right to acquire by contract with the owners, the Stein franchise and property, and in case of disagreement with the owners as to price, the right to condemn and take the said franchise and property under the State's right of eminent domain.

3. The company was given for twenty years and until purchase of its plant by the city the exclusive right to supply the city with water from any source in the county of Mobile, other than Three-Mile Creek (the Stein source of supply), and when it should acquire the Stein franchise, it was given the exclusive right from Three-Mile Creek.

4. The company was required to begin its work in four years and supply water within six years. It was required to supply water at a cost to the consumers, not exceeding certain maximum rates fixed by the Act, and to put

fire plugs on any square at the request of the owners of three-fourths of the improved property thereon.

5. After twenty years the city was given the right to purchase the plant of the company at a price to be fixed by arbitration.

With this charter, it was found possible to obtain the necessary capital. The company issued bonds to the extent of $750,000, and spent about $850,000 in the erection of a plant, taking its supply from a creek in Mobile County called Clear Creek. (Record, pages 105 and 107.) This plant proved so satisfactory to the citizens that a public statue was erected to the citizen the most active promoter of the enterprise. (Record, page 110.)

The owners of the Stein franchise endeavored by litigation to prevent the erection of the plant, but a decree in favor of the Bienville Company was affirmed by this Court (Stein *vs.* Bienville Water Supply Company, 141 U. S., 67).

The Bienville Company entered into a six-year contract with the city for the supply of water at less than the maximum prices fixed by the Act (Record, pages 11 and 110), and this contract was subsequently extended for a period which had not expired at the time of the present litigation. (Record, page 15.) The company fulfilled this contract to the letter (Record, pages 107, 118, 126, 135, 146, 165, 166), and no breach of it in any particular has been proved.

Up to the time of the present litigation, the Bienville Company had not exercised the rights given it by statute as assignee of the city to condemn the Stein franchise and plant, and the owners of that plant continued to supply water in competition, although the plant was dilapidated and the force and quality of the water poor. The treasurer of the Bienville Company, however, in its interests, had purchased interests in the Stein franchise and property amounting to fifty-four and twenty-eight one-hundredths per cent., so that indirectly the ownership of the Stein plant was gradually being acquired in the company's interest. (Record, pages 105 and 86.)

By Act of February 6th, 1897 (Record, pages 4 and 81), a new charter was given to the city of Mobile, and by its terms express authority was given to the city to build or acquire public works, subject to the approval of its citizens by a majority vote. On August 12th, 1897, there was submitted to vote and approved by a majority of citizens, a proposition that the city should purchase, build or otherwise acquire a system of water works to cost not exceeding $500,000 and a system of sewerage to cost not exceeding $250,000, to be paid for by bonds secured by a mortgage upon said public works. (Record, pages 5-81 and 48.)

The Bienville Water Supply Company offered to sell its plant to the city at a price to be fixed by a competent board of arbitration, but no such sale was effected. (Record, page 111.)

As has been already stated, the city originally had under its contract with Stein, the right to purchase the Stein plant at a price to be fixed by arbitration. This right had passed to the Bienville Company by the terms of its charter, but notwithstanding this, the City Councils, on February 18th, 1898, after the popular vote above recited, passed a resolution to purchase the Stein plant. (Record, pages 5-81 and 48.) By means of an illegal arbitration, in which the arbitrators for the Stein interests were selected by the minority interests alone, a price of $31,868.58, subject to outstanding obligations amounting to $13,131.42, in all $45,000, was fixed for the Stein plant, and the city, without the consent of the majority interests, took forcible possession. (Record, page 153.) The city, then, on June 25th, 1898, filed against Walter Wood, who was the treasurer of the Bienville Company and who, as has been already stated, had purchased in the company's interests fifty-four and twenty-eight one-hundredths per cent. of the ownership of the Stein plant, a bill in equity to compel him to carry out the arbitration and purchase. (Record, page 73.) The United States Court, however, held the arbitration and purchase illegal, and dismissed the bill. (Record, page 96.)

On September 14th, 1898, a taxpayers' bill was filed by

or at the instance of the Bienville Company to restrain the city from issuing bonds for a water plant on the ground that no legislative authority existed for such issue. (Record, page 121.)

On September 20th, 1898, the city entered into two contracts, one with J. B., H. L. and L. V. Lewman for the erection of a system of water works (Record, page 37), and one with Sperry Jones & Co. for the sale of bonds (Record, page 45). Both contracts were expressly made conditional upon the subsequent securing by the city of legislative authority. (Record, pages 40-47.) No source of water supply was designated in the contracts except that it was stipulated that the city might elect to have the pump house and stand pipe erected on "Eight-Mile "Creek" (Record, page 38), which was a creek in Mobile County, entirely distinct from the "Three-Mile Creek" of the Stein plant. (Record, page 22.)

Up to this point, the State Legislature had not taken any action which affected the respective rights of the city and the Bienville Company against each other. Subsequently, however, the legislature, against the protest of the Bienville Company, passed four statutes attempting to destroy the exclusive rights of the Bienville Company, and deprive it of all water rights under its charter except the use of Clear Creek. These statutes were passed, respectively, two on November 30th, 1898; one on December 10th, 1898 and one on February 23d, 1899 (Record, pages 41, 43, 27 and 21), and under them the city is taking steps to erect water works and to use either Three-Mile Creek or Eight-Mile Creek or both, as a source of supply. (Record, pages 29, 30.)

Briefly stated, these statutes provide:

1. The city is given power to issue bonds secured by a mortgage on the plant. (Record, page 41.)

2. The city is given power to acquire or condemn any property and the water of any stream in Mobile County, excepting only Clear Creek. (Record, page 44.)

3. The city is given power to condemn all interest, legal or equitable, not owned by the city in the Stein plant. (Record, page 27.)

4. The charter of the Bienville Company is amended by striking out the word "exclusive" from the grant of the privilege of supplying water from any other point in Mobile County than Three-Mile Creek and by striking out the provision that when the Three-Mile Creek franchise was secured the right should be also exclusive as to that. (Record, page 21.)

After three of these Acts had been passed, and the day before the fourth one was passed, the Bienville Company filed two bills in equity against the city. The first was based entirely upon its contract with the city and claimed that there was an implied agreement by the city not to enter into competition. This bill was dismissed and an appeal taken to this court was dismissed, and the decree affirmed.

Bienville Water Supply Company *vs.* Mobile, 175 U. S., 109.

The other bill was the one in the present case. It is based upon the charter rights given to the company and claims that any legislation authorizing the city to violate these rights was unconstitutional as violating the obligation of the contract contained in the charter. It sets out the charter: the declaration of the city that it intended to erect water works and take the supply of water from both Three-Mile Creek and Eight-Mile Creek, and the claim of the city that it is doing this under legislative authority and it asks for an injunction. The answer admits the acts complained of, but sets up substantially three defenses, viz.:—

1. That the contract contained in complainant's charter giving complainant exclusive rights was prohibited by the State Constitution.

2. That the State Constitution reserved to the legislature the power to amend complainant's charter and to take away complainant's exclusive rights.

3. That the complainant had been guilty of laches.

The court below, without filing an opinion, entered a decree dismissing the bill. From this decree complainant took the present appeal.

## SPECIFICATIONS OF ERROR.

*First.*—The court erred in refusing the complainant the relief sought.

*Second.*—The court erred in its decree rendered on the fourth day of June, 1900.

*Third.*—The court erred in dismissing complainant's bill as shown by its decree rendered on the fourth day of June, 1900.

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## ARGUMENT.

The important question in this case is whether the State of Alabama has violated the obligation of a valid contract which it made with the Bienville Water Supply Company.

In determining this question, the first consideration is, of course, what was the contract, the breach of which is complained of.

Its terms are to be found in the two statutes constituting the charter of the Bienville Water Supply Company. (Record, pages 66 to 73.)

The substantial rights and obligations imposed by it are to be found in the following sections:—

Preamble (Record, page 66):—

WHEREAS, The inhabitants of the municipality known as the port of Mobile, and the inhabitants of the village of Whistler, in the county of Mobile, are not provided with an adequate supply of water for domestic and municipal purposes:

AND WHEREAS, It is essential to the public health of the citizens of those towns and to the protection of their property

therein against conflagration, that an abundant supply of water should be introduced and furnished to said citizens:

AND WHEREAS, A company of citizens of said county propose to undertake the duty of furnishing such supply to said towns for the public use and benefit:

Section 1 (Record, page 66):—

*Be it enacted by the General Assembly of Alabama*, That George A. Ketchum, William H. Pratt, A. C. Danner, Thomas Henry, Sr., Duncan T. Parker, William Butler Duncan, Peter Stark, and their associates and successors be, and the same are hereby made a body politic and corporate, by the name and style of the "Bienville Water Supply Company," and as such corporation they are hereby vested with all the powers and privileges of private corporations under the laws of this State.

Section 6 (Record, page 67):—

*Be it further enacted*, That said corporation is hereby charged with the duty of introducing into the port of Mobile and the village of Whistler, in Mobile County, such supply of pure water as the domestic, sanitary and municipal wants thereof may require. And for this purpose said corporation is hereby authorized to construct all needed canals and ditches, and by pipes and aqueducts as may be found best suited for the purpose, to carry into said towns, by such line or route as may be found best, such water as may be needed, from any point in said county within twenty miles of said port or city of Mobile. In the laying of its pipes and the construction of aqueducts when required, said corporation is hereby authorized to use, free of charge, any and all public roads of the county, and streets of said town, free of charge; but when its pipes are laid in or under said roads and streets, or its other works completed, said corporation shall, without delay, restore said roads and streets to their original condition for use as public highways and thoroughfares, and for the purpose herein and hereby authorized, and to perform the public duty hereby declared, and by the acceptance of this charter imposed upon it. Said corporation shall have the right to enter upon any land of private persons, and therein and beneath the surface thereof to lay pipes for the conveyance of said water, and thereafter to repair and maintain the same; but said corporation shall not enter upon any private lot in said towns without the consent of the owner

thereof, and before entering on any private property, must first pay to the owner thereof such reasonable compensation for its use of said land for the purpose herein duclared as may be agreed upon with said owner, or in case of disagreement, as may be ascertained upon proceedings for that purpose, as directed by law, for the condemnation of private property, or the use thereof, to public use.

Section 9 (Record, page 68):—

*Be it further enacted*, That the said corporation hereby created is hereby invested with all the rights and powers which by law or contract was vested in the late municipal corporation, known as "the mayor, aldermen and common "council of the city of Mobile," by redemption, purchase or otherwise to acquire from any and all other persons, corporations or associations whatever any and all property and rights by such person or persons, corporations or associations held under any former contract or law for the introduction and supply of water into the city of Mobile, or the inhabitants thereof and for such purpose said Bienville Water Supply Company shall be held and taken to be the assignee of the said "mayor, aldermen and common council of the city of "Mobile," and may proceed to assert said rights and exercise said powers thus assigned, the same as could have been done by the municipal corporation aforesaid; and for this purpose the commissioners of Mobile, appointed under and by virtue of "An Act to vacate and annul the charter and dissolve the "corporation of the city of Mobile," approved February 11th, 1879, are hereby authorized, on the demand of said corporation, to release to said corporation all the rights of said late city of Mobile in and to such right of redemption, purchase or other acquisition of such property or rights.

Section 10 (Record, page 69):—

*Be it further enacted*, That said Bienville Water Supply Company be and is hereby authorized to acquire by contract with any person or persons, corporation, company or association claiming any right to supply the port or city of Mobile, or the inhabitants thereof, with water, such right or rights as he or they may have in the premises, and the property owned and used in connection therewith, and pay therefor such amount of money as may be agreed upon, or such as may be agreed upon in the stock of the said supply company; and in case of failure by contract to obtain such right and property,

then said corporation hereby created may proceed, as directed by law, for the condemnation and the taking of private property for public use, to obtain the same for the purpose of the public use and benefit herein declared of furnishing the port of Mobile and the village of Whistler, and the inhabitants thereof, with an adequate supply of water for domestic, sanitary and municipal purposes.

Section 11, as amended by Act of February 14th, 1885. (Record, page 72):—

*Be it further enacted*, That said corporation shall have and enjoy the exclusive right of conducting and bringing water from any point other than Three Mile Creek, in the county of Mobile, for the supply of said port of Mobile and village of Whistler for the period of twenty years from the time when said water shall have been brought within the limits of the port of Mobile, and be ready for distribution and supply to the inhabitants of the port of Mobile, and the houses and dwellings within the limits of said port. And until the municipal authorities of said port and village, if so by law authorized, shall purchase the water works and property of said corporation, as hereinafter provided, but said corporation, within four years from the passage of this Act, must begin its work, and within six years from the date of the passage of this Act must cause water to be conducted into the port of Mobile from some stream, point or place as hereinbefore named, and if when any existing claim to conduct water into Mobile from Three Mile Creek, or any other point without the limits of said port, has been obtained by this corporation, then said corporation shall have the exclusive right to supply said port and village and the inhabitants thereof with water for the period and the term aforesaid. But nothing in this Act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company. In making contracts for labor and materials in the construction of works by this Act authorized, said corporation, by its directors, are hereby empowered to stipulate for payment, in whole or in part, by the issue of shares of capital stock of said corporation to said contractors, but in no event shall the issue of certificates of capital stock exceed the amount of capital hereinbefore authorized.

Section 14 (Record, page 70):—

*Be it further enacted*, That said corporation be, and the same is hereby authorized to demand and receive compensation for the supply of water it may furnish, at not exceeding the following rates, to be paid by the person receiving the water, and in advance; that is to say. (Here follow certain specified rates.)

Section 15 (Record, page 70):—

*Be it further enacted*, That said corporation must, without charge, supply all needed water for the use of municipal buildings and hospitals of said port and the jail and the court house of the county, but shall be entitled to have and demand reasonable and proper compensation for all pipes, hydrants and labor necessary to carry the water from the main, passing said buildings to the point where the water is to be used.

This contract was neither an unusual nor an inequitable one. The evidence shows that Mobile was suffering for lack of an efficient water supply. Not only for public convenience, but for public safety and public health a new system was urgently required. The cost of erecting the necessary works was nearly a million of dollars. The city was unable or unwilling to spend the money, and numerous unsuccessful attempts had been made to induce individual investors to provide the necessary capital. These were the attending circumstances as shown by the record and by the preamble to the charter.

Turning now to the contract itself we find the following obligations imposed on the company:—

1. It was "charged with the duty of introducing" the water into Mobile.

2. It was bound to install its plant within a limited time.

3. It was bound to furnish water to the citizens at certain rates and supply certain public institutions free of charge.

4. At the end of twenty years it was bound, if the city so desired, to sell its entire plant to the city at a price to be fixed by arbitration.

In return for these obligations it was given:—

1. The right to furnish water to the city at rates not exceeding those fixed in the Act.

2. The rights previously vested in the city to acquire the outstanding water rights (viz., the Stein rights).

3. The exclusive right for twenty years or until the purchase of its plant by the city, of supplying the city from any source in the county of Mobile, other than Three-Mile Creek (the Stein source), and when it should acquire the Stein rights it was given the exclusive right to supply from Three-Mile Creek.

It is obvious that the acceptance of this charter not only involved the expenditure by the company of a very large sum of money, but the assumption of an onerous public duty, and that the main consideration for this was the exclusive right securing it from competition for twenty years, and until the city purchased its plant.

The language of the charter is significant. It declares (Section 6, Record, page 67):—

> That said corporation is hereby charged with the duty of introducing into the port of Mobile and the village of Whistler, in Mobile County, such supply of pure water as the domestic, sanitary and municipal wants thereof may require.

And later in the same section,

> to perform the public duty hereby declared and by the acceptance of this charter imposed upon it.

It may be said in passing that the Supreme Court of Alabama held that the effect of this language was to impose the duty of supply, whether or not the city kept its contract, and that the company might be enjoined from discontinuing the flow of water to compel performance by the city.

> Bienville Water Supply *vs.* Mobile, 112 Ala., 260, printed in Record, page 99.

No company or individual would have assumed such duties or made such expenditures without being secured

against competition, and the provisions in the charter are carefully framed to accomplish that end. The State could not directly give the exclusive right to supply the city from any source in the county of Mobile since an exclusive right had already been granted to Stein to use Three-Mile Creek. The State could, however, give the exclusive right to every other source within the county, and it could vest in the company the right of the city to acquire the Stein franchise, and the right of the State to condemn it, and once acquired this right could be made exclusive. Accordingly, we find in section 9 (Record, page 68), a provision by which the company is vested with all the right which the city, either by law or contract, had to acquire any rights for the introduction of water into Mobile, and that the company "shall be held and taken to be the assignee of" the city. We also find in section 10 (Record, page 69) a grant to the company of the right to condemn any outstanding right to supply Mobile with water, and in section 11 (Record, page 72), as amended, we find a grant of an exclusive right from all sources in the county other than Three-Mile Creek, and an exclusive right from that when acquired. Stein had by his contract ratified by the legislature, the "sole privilege of supplying the city of Mobile with water from Three-Mile Creek" (Record, page 174), so that the effect of the Bienville Company's charter was to exclude from competition for twenty years, every one but Stein or his assigns, and to give the company all rights which the State or city had to acquire and use the Stein franchise within that time.

It has not been overlooked that the charter contained the clause (Record, page 73)—

> But nothing in this Act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company.

The purpose of this proviso is not very important in view of the fact that no other company has been incor-

porated for supplying Mobile, but it certainly was not intended to destroy the express grant of exclusive rights to streams in the county of Mobile, and it expressly saves the property and water rights of the Bienville Water Supply Company. Probably the clause was introduced because the grant to the Bienville Water Supply Company was for a limited period, and was conditional upon the commencement and completion of the plant within certain periods. The framer of the statute probably wished to exclude any possible construction which would prevent the incorporation of another company if the Bienville Company did not build the works or if its grant expired. At all events the intention is clear not to destroy or restrict the rights previously given to the Bienville Company.

It is settled by repeated decisions of this court that such a contract as that here presented between the State and the Bienville Water Supply Company is ordinarily within the power of a State to make, is founded upon adequate consideration and is inviolable. The general principles governing their enforcement cannot be better stated than in the language of this court through Mr. Justice Harlan in—

New Orleans Gas Light Co. *vs.* Louisiana Gas Light Co., 115 U. S., 650,

as follows:—

If the State can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits, if she may restrict the exercise of the power of taxation by granting exemption from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health or the public safety, to grant

a franchise, to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies.

And on page 670:—

It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation vested with the power and charged with the duty of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, this work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable either that the cost of supplying the city and its people would have been made in some form, a charge upon the public, or the public would have been deprived of the security in person, property and business which comes from well-lighted streets.

This was the case of a gas company, but the same principles were applied to a water company in—

New Orleans Water Works Co. *vs.* Rivers, 115 U. S., 674;

St. Tammany Water Works *vs.* N. O. Water Works, 120 U. S., 64;

the latter a case in which a water company was given an exclusive privilege for fifty years of supplying New Orleans with water from the Mississippi River or any other stream or river. And also in the case of—

Walla Walla City *vs.* Walla Walla Water Co., 172 U. S., 1.

That the obligation of this contract was violated by the State admits of no serious doubt.

The water company performed its part of the contract. It spent $850,000 in erecting works which were completed in 1889. For nine years of the twenty it has performed the public duties it assumed. The evidence would seem to justify its assertion that it performed these duties well, but whether it performed them well or ill, is besides the question. It performed them, and for any dereliction of duty both the State and city have ample remedies. At the end of the nine years the State took away by legislation the exclusive right which was necessarily the main consideration for its contract. That such is the effect of the legislation, cannot be denied. The two Acts of November 30th, 1898, authorize the city to direct its own water works and take its supply from "any stream, creek, "spring or river * * * situated in Mobile County." (Record, page 44.) The Act of December 10th, 1898, authorizes the city to condemn the outstanding interests not owned by the city in the Stein Water Works, viz., the fifty-four twenty-eight one-hundredths per cent., owned by the treasurer of the Bienville Water Supply Company and acquired in its interests. (Record, page 27.) The Act of February 23d, 1889, amends the charter of the Bienville Water Supply Company by omitting the exclusive right to the sources other than Three-Mile Creek, and to Three-Mile Creek when acquired. (Record, page 21, and compare with original Act, page 72.)

The amendment of this last Act can best be shown by putting the original section and the amended section in parallel columns. The words omitted in the amendment being italicized.

| Act of 1885. | Act of 1899. |
| --- | --- |
| That said corporation shall have and enjoy the exclusive right of conducting and bringing water from any point, other than Three Mile Creek, in the county of Mobile, for the supply of said port of Mobile and village of Whistler, for the period of twenty years from the time when said water shall have been brought within the limits of | That said corporation shall have and enjoy the right of conducting and bringing water from any point, other than Three Mile Creek, in the county of Mobile, for the supply of said port of Mobile and village of Whistler, for the period of twenty years from the time when said water shall have been brought within the limits of the said port of |

the port of Mobile and be ready for distribution, and supply to the inhabitants of the port of Mobile and the houses and dwellings within the limits of said port, and until the municipal authorities of said port and village, if so by law authorized, shall purchase the water works and property of said corporation, as hereinafter provided, but said corporation, within four years from the passage of this Act, must begin its work, and within six years from the date of the passage of this Act, must cause water to be conducted into the port of Mobile from some stream, point or place as hereinbefore named, *and if when any existing claim to conduct water into Mobile from Three Mile Creek, or any other point without the limits of said port, has been obtained by this corporation, then said corporation shall have the exclusive right to supply said port and village and the inhabitants thereof with water for the period and the term aforesaid. But nothing in this Act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company.* In making contracts for labor and materials in the construction of works by this Act authorized, said corporation, by its directors, are hereby empowered to stipulate for payment, in whole or in part, by the issue of shares of capital stock of said corporation to said contractors, but in no event shall the issue of certificates of capital stock exceed the amount of capital hereinbefore authorized. (Record, page 72.)

Mobile and be ready for distribution, and supply to the inhabitants of the port of Mobile and the houses and dwellings within the limits of said port, and till the municipal authorities of said port and village, if so by law authorized, shall purchase the water works and property of said corporation, as hereinafter provided, but said corporation, within four years from the date of the passage of this Act, must begin its works, and within six years from the date of the passage of this Act, must cause water to be conducted into the port of Mobile from some stream, point or place as hereinbefore named. In making contracts for labor and materials in the construction of works by this Act authorized, said corporation, by its directors, are hereby empowered to stipulate for payment, in whole or in part, by the issue of shares of capital stock of said corporation to said contractors, but in no event shall the issue of certificates of capital stock exceed the amount of capital hereinbefore authorized. (Record, page 21.)

In taking back this consideration of the contract the State did not proceed under its power of eminent domain. It did not condemn the exclusive franchise of the Bienville Water Supply Company. It merely took it away. It is true it authorized the city to condemn the interests in the Stein Water Works, but there is no provision for the condemnation of the exclusive franchise given by its charter to the Bienville Water Supply Company, which includes the right to acquire and exclusively use the Stein franchise.

The result of this is that while the water company has spent its $850,000, and while it is still under a public duty to supply Mobile with water, its exclusive right which was the consideration therefor is taken away, and it is threatened with competition by the city, which takes its water from the very source of supply given to the company.

What the effect of such competition will be may be well stated in the language of this court through Mr. Justice Brown in—

Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 1-11,

as follows:—

The argument which attacks the jurisdiction of the court upon the ground that the complaint is devoid of facts showing any matter which vests jurisdiction goes rather to the sufficiency of the pleading than to the jurisdiction of the court. Even if this objection had been sustained, the difficulty could have been easily obviated by amendment. We think, however, that it sufficiently appears that if the city were allowed to erect and maintain competing water works the value of those of the plaintiff company would be materially impaired, if not practically destroyed. The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and the citizens would naturally take their water where they could procure it cheapest. The plaintiff, upon the other hand, must carry on its business at a profit, or the investment becomes a total loss. The question whether the city should supply itself with water, or contract with a

private corporation to do so, presented itself when the introduction of water was first proposed, and the city made its choice not to establish works of its own. Indeed, it expressly agreed, in contracting with the plaintiff, that until such contracts should be avoided by a substantial failure upon the part of the company to perform it, the city should not erect, maintain or become interested in any water works except the plaintiff's. To require the plaintiff to aver specifically how the establishment of competing water works would injure the value of its property, or deprive it of the rent agreed by the city to be paid, is to demand that it should set forth facts of general knowledge, and within the common observation of men. That which is patent to any one of average understanding need not be particularly averred.

It has been shown that the State made a contract with the Bienville Water Supply Company, and that it deliberately violated this contract, to the great damage of the company. It remains to be considered what defense is set up to the right which, under ordinary circumstances, the company would have to an injunction against the city from carrying out such legislation.

The defense of the city is twofold, viz.:—

*First.*—That the contract itself was invalid.

*Second.*—That by the Constitution of Alabama, the legislature had the right to break the contract at its pleasure, and that the justice or injustice of such breach canot be inquired into by the courts.

*Was the contract invalid?*

The city relies on this ground upon article I., section 23, of the Constitution of Alabama of 1875, which reads as follows:—

That no *ex post facto* law or any law impairing the obligation of contracts or making any irrevocable grants of special privileges or immunities shall be passed by the General Assembly.

It will be observed that this section does not prohibit the granting of special privileges, but the making of any "irrevocable" grants of such privileges. It must be read in connection with article XXIV., section 1, of the same Constitution, which reads:—

> Corporations may be formed under general laws, but shall not be created by special Act, except for municipal, manufacturing, mining immigration, industrial and educational purposes or for constructing canals or improving navigable rivers and harbors of this State, and in cases where, in the judgment of the General Assembly, the objects of the corporation cannot be attained under general laws. All general laws and special Acts passed pursuant to this section may be altered, amended or repealed.

and with article XIV., section 10, of the same Constitution, which reads:—

> The General Assembly shall have the power to alter, revoke or amend any charter of incorporations now existing and revocable at the ratification of this constitution or any that may hereafter be created whenever in their opinion it may be injurious to the citizens of the State, *in such manner, however, that no injustice shall be done to the corporators.*

It is not necessary to consider whether the rights given to the Bienville Water Supply Company by its charter were "special privileges or immunities" within the prohibition of this Constitution, although it may be pointed out in passing that they were limited as to time, and as to source of supply, and that the Stein privilege which was assigned by the State to the Bienville Water Supply Company antedated the Constitution of 1875. Assuming, for the sake of argument, that any exclusive right given to a corporation for even a limited time or a limited territory is a "special privilege or immunity," it does not follow from the sections above that the privilege is invalid, but only that it is revocable. The effect of article I., section 23, and article XXIV., section 1, was to write into every grant of a special privilege and every character of incorporation a provision that it could be revoked or repealed, and the effect of article XXIV., section 10,

of the Constitution was that if the grant was part of the charter of a corporation it could only be repealed in such manner that no injustice should be done to the corporators.

We thus reach what is the real question in the case, not whether the charter was invalid, not even whether it is revocable, but whether it can be revoked or changed without doing justice to the corporators. Even this question resolves itself into another, viz., Can the courts inquire whether justice has been done? In other words, is the question whether injustice has been done to the corporators a judicial or a legislative question? This is really the only question in the case. It is the one issue which in the last analysis of this case remains.

*Did the legislature have the right to break the contract contained in appellant's charter without any right on the part of appellant to invoke the aid of the courts to enforce the constitutional limitation on the legislative power of revocation?*

The city, insists in its brief, that the question of whether injustice has been done to the corporators is a question "of legislative discretion," and not "of judicial determina-"tion." The water company insists that it is a question for judicial determination.

The question is one of very great importance, not only in this particular case, but to the country at large.

The origin of the reservation of the right of repeal now as generally introduced in State Constitutions, is stated by this court, speaking by Mr. Justice Gray, in—

Looker *vs.* Maynard, 179 U. S., 46,

as follows (pages 51 and 52):—

By the decision in the leading case of Dartmouth College *vs.* Woodward, 4 Wheat., 518, it was established that a charter from the State to a private corporation created a contract,

within the meaning of the clause in the Constitution of the United States forbidding any State to pass any law impairing the obligation of contracts, and, consequently, that a statute of the State of New Hampshire, increasing the number of the trustees of Dartmouth College as fixed by its charter, and providing for the appointment of a majority of the trustees by the executive government of New Hampshire, instead of by the board of trustees, as the charter provided, was unconstitutional and void.

Mr. Justice Story, in his concurring opinion in that case, after declaring that in his judgment it was "perfectly clear "that any Act of a legislature which takes away any powers "or franchises vested by its charter in a private corporation "or its corporate officers, or which restrains or controls the "legitimate exercise of them, or transfers them to other per-"sons without its assent, is a violation of the obligations of "that charter," took occasion to add: "If the legislature "mean to claim such an authority it must be reserved in the "grant." 4 Wheat., 712.

After the decision many a State of the Union, in order to secure to its legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its Constitution, a provision that charters thenceforth granted should be subject to alteration, amendment or repeal, at the pleasure of the legislature. See Greenwood *vs.* Freight Co., 105 U. S., 13, 20, 21. The effect of such a provision, whether contained in an original Act of incorporation or in a Constitution or general law subject to which a charter is accepted is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs. Sherman *vs.* Smith, 1 Black, 587; Miller *vs.* State, 15 Wall., 478; Holyoke Co. *vs.* Lyman, 15 Wall., 500; Sinking Fund Cases, 99 U. S., 700, 720, 721; Close *vs.* Glenwood Cemetery, 107 U. S., 466; Spring Valley Water Works *vs.* Schottler, 110 U. S., 347; New York & New England Railroad *vs.* Bristol, 151 U. S., 556.

In most of the States in which the power of repeal is not limited to general laws, the framers of the Constitu-

tions or of the amendments to Constitutions, saw that an unlimited power of repeal by special laws would be as injudicious as any other unlimited power to take private property or to violate contracts. They saw that such an unlimited power would discourage conservative investors of capital and might lead to piratical attacks on corporations. Accordingly, they gave not an unlimited power of repeal or amendment, but a limited one. In at least nine of the States, viz., Alabama, Arkansas, Georgia, Pennsylvania, Colorado, Idaho, Mississippi, Oregon and South Dakota, the Constitutions, while giving the power of repeal or amendment by special laws, provide, substantially, that this power shall be exercised in such manner as to do no injustice to the corporators. In these States an immense amount of corporate capital has been invested on the faith of this guaranteed right. To the extent of the value of the corporate franchise it is as important as the provision of the Constitution, which guarantees them just compensation for property taken by the State. If the limitation as to the method of exercising this power of repeal is a mere direction to the legislature, unenforceable by the courts, the practical effect of the introduction of the limitation into the State Constitutions is destroyed, and in those States, as in the States where an unrestricted right of repeal is given, the legislature can, without let or hindrance, arbitrarily and unjustly impair or destroy legislative franchises. On the other hand, if the constitutional limitation can be enforced by the court, corporate franchises may still be altered or destroyed, but justice must be done to the corporators.

In considering this question, it is a fact of some importance that the people of Alabama deliberately inserted in their Constitution the present equitable restriction on the right of repeal after nine years' experience of a Constitution giving an unlimited right of repeal. Prior to 1868 the successive Constitutions of Alabama contained no reservation of a right to repeal charters. The Constitution

of 1868 first introduced that reservation in the following words:—

Article 13, section 1. Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes. All general laws and special Acts passed pursuant to this section may be altered, amended or repealed.

Evidently this unlimited power of repeal was found to be too broad and too discouraging to investors, as in 1875 a new Constitution was adopted (the one in force when the Bienville Water Supply Company was incorporated) and a clause was added restricting the right of repeal so that it should only be exercised "in such manner, however, "that no injustice shall be done to the corporators." The provisions of the 1875 Constitution in relation to amendment read:—

Article XIII., section 1. Corporations may be formed under general laws, but shall not be created by special Act, except for municipal, manufacturing, mining, immigration, industrial and educational purposes, or for constructing canals or improving navigable rivers and harbors of this State, and in cases where, in the judgment of the General Assembly, the objects of the corporation cannot be attained under general laws. All general laws and special Acts passed pursuant to this section may be altered, amended or repealed.

SECTION 10. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revokable at the ratification of this Constitution or any that may hereafter be created whenever, in their opinion, it may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew, or extend the charter of more than one corporation.

It will be observed that these provisions broadened the somewhat narrow policy of the previous Constitution, and offered more inducements to the investment of capital in corporations. Special charters might be granted for corporations whose work within the State would be of public benefit, and the right of repeal of such charters was limited by an equitable provision, which prevented destruc-

tion of franchises without compensation. It may be noted also that where in these provisions any subject was referred to the discretion of the legislature, it was so referred in express terms, as, for example, the provision that special Acts may be passed "in cases where, *in the judgment "of the General Assembly*, the objects of the corporation "cannot be attained under general laws," and the right of repeal "whenever, *in their opinion*, it may be injurious to "the citizens of the State." Had the framers of the Constitution intended to leave to the legislature the question whether the repeal was accomplished without injustice to the corporators they would have expressly so stated, and the restricting clause would have read, "in such manner, "however, as in the judgment of the General Assembly "will cause no injustice to the corporators." There was evidently no such intention on the part of the framers of the Constitution. They intended to limit by an equitable provision the previously existing unrestricted right of repeal, and to protect corporate franchises from confiscation as individual property was protected. This was deliberately done after nine years' experience under a Constitution containing no such safeguard.

No better case than the present one could be devised in which to raise the question, since here there was not even a pretense of doing justice to the corporators. In the Act of February 23d, 1899 (Record, page 21), the Act upon which the other two statutes of November 30th, 1898, and December 10th, 1898, depend for their efficacy, the charter of the Bienville Water Supply Company is amended by leaving out the exclusive privileges. No compensation is awarded, and no provision for compensation made. A right, the principal consideration for the expenditure of $850,000 and the assumption of important public duties, is taken away by a simple amendment leaving out the grant of the right.

The other statutes are equally devoid of any provisions for securing justice to the corporators. The Act of November 30th, 1898 (Record, page 43), gives the city of

Mobile the right to use the sources of supply, the exclusive right to which had been granted to the Bienville Water Supply Company, without compensation to or permission of the latter company.

The Act of December 10th, 1898 (Record, page 27), authorizing the city of Mobile to condemn the outstanding interests in the Stein works, does indeed inferentially provide for compensation, but only for interests in those works, and not for the destruction of the exclusive franchise of the Bienville Water Supply Company (including the right as assignee of the city to acquire and exclusively use the supply from Three-Mile Creek).

The case is one, therefore, in which justice in the sense in which it is understood and administered by courts has not been done or attempted by the legislature.

Can the courts inquire into this question?

The answer, it is submitted, ought not to be difficult. The phrase "that no injustice to be done to the corpo-"rators" is one of those general restrictions on legislative power so common to State Constitutions, and which from the necessities of the case cannot be framed in more specific language. This court, speaking by Mr. Justice Miller, in—

Davidson *vs.* New Orleans, 96 U. S., 97 (page 104), said:—

But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the case presented for decision shall require, with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce and other powers conferred on the Federal Government, or limitations imposed upon the States.

It is manifest that some of the most important of the provisions for the protection of individual or corporate

rights against legislative encroachment must, of necessity, be framed in general and indefinite language, and that any attempt more accurately to express or define them would result in unduly limiting them. The framers of our Constitutions have wisely put in clear, but general and untechnical language, the most important of these provisions, and to-day the phrases "without due process of "law" and "without just compensation" are the expressions of two of the most important safeguards of private liberty and private property. To say, therefore, that a corporate charter shall only be amended in such manner that no injustice shall be done to the corporators, is simply to protect corporate franchises in the same way and by similarly indefinite language as private property is protected. In the one case, just compensation must be made, in the other no injustice shall be done.

This being so, will such a constitutional protection be inforced by the courts? That it was intended to be so inforced, is the strong inference from the fact that it was put in the Constitution, and reasoning by analogy to other similar general safeguards in the Constitutions and their inforcement by the courts, it would seem clear that the courts which interpret the law, not the legislature which makes it, is necessarily the judge whether there is a violation of the constitutional limitation. This court has always rejected the argument that the question of compliance with such general constitutional restrictions is a legislative question. Speaking by Mr. Justice Brewer in—

Monongahela Nav. Co. *vs.* U. S., 148 U. S., 312, it said (page 327):—

By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property through Congress or the legislature, its representative to say what compensation shall

be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In Charles River Bridge *vs.* Warren Bridge, 11 Pet., 420, 571, Mr. Justice McLean, in his opinion, referring to a provision for compensation found in the charter of the Warren Bridge, uses this language: "They (the legislature) provide that the "new company shall pay annually to the college, in behalf of "the old one, one hundred pounds. By this provision it ap- "pears that the legislature has undertaken to do what a jury "of the country only could constitutionally do: assess the "amount of compensation to which the complainants are en- "titled." See, also, the following authorities: Commonwealth *vs.* Pittsburgh & Connellsville Railroad, 58 Penn. St., 26, 50; Penn. Railroad *vs.* Balt. & Ohio Railroad, 60 Maryland, 263; Isom *vs.* Mississippi Central Railroad, 36 Mississippi, 300.

In the last of these cases, and on page 315, will be found these observations of the court: "The right of the legisla- "ture of the State, by law to apply the property of the citi- "zen to the public use, and then to constitute itself the judge "in its own case to determine what is the 'just compensation,' "it ought to pay therefor, or how much benefit it has con- "ferred upon the citizen by thus taking his property without "his consent, or to extinguish any part of such 'compensa- "'tion' by prospective conjectural advantage, or in any man- "ner to interfere with the just powers and province of courts "and juries in administering right and justice cannot for a "moment be admitted or tolerated under our Constitution. "If anything can be clear and undeniable upon principles of "natural justice or constitutional law, it seems that this must "be so."

And the court cites with approval the case of—

Commonwealth *vs.* Pitts. & Con. R. R., 58 Pa., 26, in which it was held that the reservation of a power to repeal a charter upon the misuse or abuse of corporate privileges, did not constitute the legislature the sole judge of such misuse or abuse, the court (Sharswood, J., delivering the opinion) saying (page 46):—

If this were a contract between man and man, it could not be pretended that when one party reserves the power to rescind in a certain event, he is thereby constituted the judge of whether the event has occurred. It is a condition precedent

to the exercise of the power, and the party claiming it must prove affirmatively the existence of the fact. What difference does it make that the State is one of the parties? She has entered into this contract through the legislature, and in the decision of all questions of fact which may arise upon it the judiciary department must be invoked as in other cases.

The suggeston in this last citation is very pertinent. Suppose, in the present case, the clause in the State Constitution instead of being found there had been part of the charter, and the legislature in granting the franchise had stipulated that it might be revoked in such manner as to do no injustice to the corporators, would the legislature in such case have been the sole judge as to the injustice?

*As to the question of laches.*

But little need be said upon this point. This defense must necessarily be founded on delay and not on estoppel, since nowhere in the testimony is there any declaration by any person that he did or omitted any act under the belief that the Bienville Water Supply Company did not intend to assert its rights or because he was misled by any act or omission of that company. From the very nature of the case it was apparent to the city of Mobile, and to every person interested, that the Bienville Water Supply Company would contest most vigorously and to the bitter end this attack upon its franchises. Indeed, its duty, not only to its own stockholders, but to the capitalists who had taken its bonds in reliance upon its charter, compelled it to do this. It would be absurd from the circumstances of the case to suppose that anyone did any act in the belief that the Bienville Water Supply Company would acquiesce in the destruction of its most important franchises.

WAS THERE ANY DELAY WHICH PRECLUDED THE BIENVILLE WATER SUPPLY COMPANY FROM ASSERTING ITS RIGHTS?

The fact is that none of the Acts performed by the city of Mobile could have affected the rights of the Bienville Water Supply Company under its contract with the State, unless the State, through its legislature, attempted to break the contract. It was not therefore, until the statutes were passed which are set up in the defendant's answer, that the necessity for filing the present bill arose. These statutes were four in number. Two of them passed on November 30th, 1898, giving to the city the power to borrow money and to condemn property; one of them passed on December 10th, 1898, giving to the city the right to condemn the outstanding interest in the Stein Works, and the last one, passed February 23d, 1899, amending the charter of the Bienville Water Supply Company and taking away its exclusive rights. The breach, by the State, of the contract was not complete without this last Act; its passage was necessary to remove the obstruction of the contract which stood in the way of the city's competition.

The bill in the present case was filed one day before the approval of this last Act, and presumably therefore either after or just at the time of its final passage by the legislature. The city had not commenced the erection of its new works, but had simply made surveys. Its contractors had, at some time between December 1st, 1898, and February 22d, 1899, laid considerable pipe in the streets of Mobile, but neither contractor nor city official has testified that this was done under any belief that the water company would not file its bill if the final Act amending its charter was passed.

Where, then, was the delay in this case which should turn the complainant out of court and prevent the court from giving it the justice to which it is entitled? The bill was filed the day before the approval of the final statute, and immediately thereafter the answer of the defendant was filed setting up that final statute as a defense to the bill. (Record, page 21.)

Instead of presenting a case of extraordinary delay, the case seemed to have been one of diligence.

To recapitulate, it is submitted:—

*First.*—That the Bienville Water Supply Company had a valid charter giving to it certain valuable franchises in return for the expenditure of money and the assumption of public duties.

*Second.*—That the Bienville Water Supply Company spent the money, and assumed and is performing the duties.

*Third.*—That the legislature altered the franchises by taking away one of its most valuable features, without any pretense of making compensation or doing justice to the corporators, and that the city of Mobile, under authority of this legislation, is about to enter into a competition based upon this legislative injury to the corporate franchise of the Bienville Water Supply Company.

*Fourth.*—That it is within the power of the court to protect the Bienville Water Supply Company against this violation of its contract, and to enforce in its favor a constitutional limitation upon the legislature's power of amendment.

*Fifth.*—That there has been no laches which would preclude plaintiff's right to relief.

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